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December 9, 1998

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Secretary

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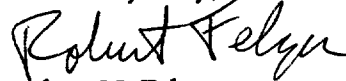
Re: WTB Docket No. 98-181

Dear Ms. Salas:

Transmitted herewith, on behalf of the Association for East End Land Mobile Coverage, LMR 900 Association of Suffolk, Metro NY LMR Association, NY LMR Association, and Wireless Communications Association of Suffolk County (the "Associations"), is an original and 6 copies of the Associations' Consolidated Motion to Delete and/or Change Issue to be filed in the above-referenced docket.

Should further information be necessary, please contact the undersigned.

Yours very truly,



Robert N. Felgar

Counsel for

Association for East End Land Mobile Coverage

LMR 900 Association of Suffolk

Metro NY LMR Association

NY LMR Association

Wireless Communications Association of Suffolk County

RNF:deb

Enclosures

cc: The Honorable John M. Frysiak
Judy Lancaster, Esq.
Russell H. Fox, Esq.

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ORIGINAL

Before the
Federal Communications Commission
Washington DC 20554

In the Matters of

NORCOM COMMUNICATIONS CORPORATION
ASS'N FOR EAST END LAND MOBILE COVERAGE
LMR 900 ASSOCIATION OF SUFFOLK
METRO NY LMR ASSOCIATION
NY LMR ASSOCIATION
WIRELESS COMM. ASSOCIATION OF SUFFOLK COUNTY

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) WTB Docket No. 98-181
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TO: Hon. Administrative Law Judge John M. Frysiak

CONSOLIDATED MOTION
TO DELETE AND/OR CHANGE ISSUE

The Association for East End Land Mobile Coverage, LMR 900 Association of Suffolk, Metro NY LMR Association, MY LMR Association, and Wireless Communications Association of Suffolk County ("Associations"), by their attorneys and pursuant to section 1.229 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.229 (1997), hereby move the Presiding Judge to delete and/or change the claim that the Associations unlawfully transferred control of their stations to Norcom Communications Corporation ("Norcom")

as specified in the Commission's October 14, 1998, Hearing Designation Order ("HDO") in the above-caption matter.¹

The HDO accuses the Associations of violating FCC standards that do not apply to them. In particular, the HDO states that the FCC assesses whether a transfer of control has occurred by employing the six-factor test first enunciated in *Intermountain Microwave*. 24 Rad. Reg. 983 (1963); HDO at ¶ 8. The *Intermountain Microwave* test, however, only applies to commercial mobile radio service ("CMRS") providers and other common carriers. See *Public Notice* No. DA 96-1245 (1996); see also *CMRS Fourth Report and Order*, 9 FCC Rcd 7123 ¶ 20 (1994) (CMRS unauthorized transfer of control issues will be analyzed using six-factor *Intermountain Microwave* test). The test does not apply to non-CMRS licensees such as the Associations. *Id.* Thus, because of "unusual circumstances warranting deletion," *American Broadcasting Companies, Inc.*, 20 FCC 2d 403, ¶ 13 (1969), namely the HDO's specification of a legal wrong that does not apply to the Associations, the Presiding Judge should delete the issue.

The standard for determining whether a non-CMRS licensee has unlawfully transferred control to another entity is set forth in *Motorola, Inc.* ("*Motorola*"), as described in *Public Notice* No. 1932, released March 3, 1998, ("[T]he Bureau takes this

¹Section 1.229 of the FCC's rules specifies that motions to enlarge, change or delete issues should be submitted within fifteen (15) days after the full text or a summary of the order designating a case for hearing has been published in the *Federal Register*. *Federal Register* publication has not occurred. Nevertheless, the Associations submit this Motion in advance of the regulatory deadline in the interests of facilitating more expeditious resolution of this matter. The Associations have simultaneously submitted herewith a Motion asking the Presiding Judge to extend the period of time by which the Associations are required to respond to the FCC's requests for admission until after the presiding officer disposes of the instant Motion. The submission of this Motion does not waive any of the Associations' rights to request further changes or deletions to the issues in this proceeding consistent with the time period established in Section 1.229 of the regulations.

opportunity to restate the guidelines"). The tests are not comparable. The *Intermountain Microwave* standard involves the licensee's relationship with others and evaluates such factors as unfettered access to facilities, employment decisions, and the payment of operating expenses, etc. The *Motorola* standard, by contrast, focuses on such issues as how the licensee obtained its equipment and the licensee's ultimate ability to terminate the management contract. Specifically, the *Motorola* standard differs from the *Intermountain Microwave* standard inasmuch as the *Motorola* standard inquires into the following: (a) licensee's financing for purchase of equipment obtained independent of manager; (b) equipment not sold to licensee for reduced price in return for permitting the manager to serve as manager; (c) there is nothing to distinguish the licensee's equipment purchase from the manager from other entities' purchase of equipment from the manager; (d) licensee retains authority under the management contract to supervise and instruct the manager; and (e) management contract permits licensee to terminate the contract if the manager fails to perform as instructed.

Accordingly, the HDO proceeding cannot logically or lawfully proceed with respect to this issue, especially if the sanction for non-compliance with the incorrectly identified standard is as severe as license revocation and the monetary forfeitures specified in the HDO.

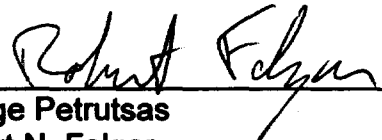
The Associations, therefore, request that the Presiding Judge delete the issue of unlawful transfer of control. Nor should the Presiding Judge allow the FCC to change the issue to incorporate the correct legal standard. The FCC has not performed an

underlying investigation² to uncover any of the facts necessary to apply that test. The Commission cannot amend its allegations to fit the Associations at this late date – it must first perform an investigation that results in a substantial and material question of fact. Thus, the issue should be deleted in its entirety.

Based on the foregoing, the Associations respectfully request that the Presiding Judge delete the issue of unlawful transfer of control as against the Associations.

Respectfully submitted,

ASSOCIATION FOR EAST END LAND
MOBILE COVERAGE
LMR 900 ASSOCIATION OF SUFFOLK
METRO NY LMR ASSOCIATION
NY LMR ASSOCIATION
WIRELESS COMM. ASSOCIATION OF
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WIRELESS COMM. ASSOCIATION OF
SUFFOLK COUNTY

December 9, 1998

²The FCC's investigation that resulted in the HDO took two years and cost the Associations time and legal fees.

Certificate of Service

I, Deborah N. Lunt, a secretary with the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 9th day of December, 1998, I caused copies of the foregoing "Consolidated Motion to Delete and/or change Issues" to be delivered by facsimile and first-class mail, postage prepaid, to the following:

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Federal Communications Commission
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*By Hand Delivery